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Dated: 12/04/97

CASE NO. 95-INA-424

In the Matter of:

GREEN CROSS PHARMACIES, INC.
Employer

on behalf of

AJIT S. GREWAL
Alien

APPEARANCE: Satwant Singh Pandher, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On February 25, 1993, the Employer, Green Cross Pharmacies, Inc., filed an application for labor certification to enable the Alien, Ajit S. Grewal, to fill the position of Pharmacist. Subsequently, on May 4, 1993, the Employer amended the application (AF 9). The job duties for the position were described as follows:

Compound, dispense & prepare prescriptions; monitor patient profiles, adverse drug interaction; advise patients on prescription, non prescription drugs, minor ailment treatment & storage; keep inventory of controlled substances & ensure proper use. Supervise ordering of drugs, over the counter medication, vitamins, health/beauty aids & procedures for disposal of hazardous waste drugs. Preserve biological vaccines, serums & drugs subject to deterioration. Prepare & file reports to State & Federal reg. agencies & claim form to Medicaid & private insurers including review & resubstantiation of rejected claims. Carry out third party billing procedures. Supervise Assistant Pharmacist, clerk.

The stated requirements for the position are: a Bachelor's degree in Pharmacy; 1 year 6 months of experience in the job offered; and a license as a pharmacist by the New Jersey Board of Pharmacy (AF 9).

The CO issued a Notice of Findings on November 15, 1994, proposing to deny certification on the grounds, *inter alia*, that the job opportunity involves a combination of duties which includes duties of a Retail Store Manager and Bookkeeper, in violation of §656.21(b)(2); and that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers, in violation of §656.21(b)(6) and §656.20(c)(8). (AF 76-79) .

The Employer submitted its rebuttal on or about December 20, 1994 (AF 80-119). The CO found the rebuttal unpersuasive and issued a Final Determination on December 28, 1994, denying certification on the same grounds (AF 3-7).

On January 26, 1995, the Employer filed a request for review of the denial of certification (AF 124-136). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review. Pursuant to this Board's Order Granting Extension, dated July 18, 1995, the Employer's brief, which was filed on or about August 5, 1995, has been considered.

Discussion

Under 20 C.F.R. §656.21(b)(2)(ii), a combination of duties is presumed to be an unduly restrictive requirement. The presumption may be overcome if the employer demonstrates that it normally employs workers to perform that combination of duties; and/or workers customarily perform that combination of duties in the area of intended employment; and/or the combination of duties is based on a business necessity.

Since the Employer required 1 year 6 months of experience in the job offered, the duties of the position are incorporated in the requirement. Thus, the Employer, in effect, is requiring 1 1/2 years of experience not only in duties which are clearly those performed by a pharmacist, but also in duties which are more consistent with those of a Retail Store Manager and Bookkeeper.

Accordingly, in the Notice of Findings, the CO stated, in pertinent part:

The job offered includes duties of : Supervise ordering of drugs, over the counter medication, vitamins health/beauty aids and prepare and file reports and claim forms to Medicaid and private insurers, carry out third party billing procedures. Employer's position appears to combine duties of Manager, Retail Store, and Bookkeeper. (emphasis in original).

These duties are not normally combined and employer must document that the combination of duties arises from business necessity or amend job duties.

In addition, we do not accept employer's insistence that a pharmacist have experience in each listed job duty.

(AF 78).

The CO instructed the Employer on how to establish the business necessity for these duties, as follows:

If employer elects to document the business necessity, the employer should establish that all other present and previous employees had this combination of skills and that the combination of skills was a condition of hire; if all prior pharmacists did not have these skill, employer should document how this combination of duties was done in the past; document how employers of like size and type handle these duties; establish that no other personnel can do one or more of these duties.

An employer must document that it is necessary to have one worker perform the combination duties, including showing of such level of impracticality to make the employment of two workers infeasible, including a showing by employer that reasonable solutions such as part-time workers, new equipment and company reorganization are infeasible.

(AF 78).

Employer's rebuttal consists of a cover letter, dated December 20, 1994, by its prior attorney (AF 117-119); a letter by Theresa Battista Needham, a Registered Pharmacist for Employer, dated December 19, 1994, with an accompanying Affidavit (AF 106-112); several almost identical letters, dated December 7, 1994, by various pharmacies which state that the Employer's combination of duties and requirements are necessary (AF 100-102);¹ a copy of this Board's decision in *Matagorda County Hospital District* 88-INA-545 (Jan. 31, 1990)(where a 2-1 majority of the panel remanded the case to the CO after noting the difference between retail and hospital pharmacists)(AF 97-99); and, copies of pages from the Occupational Outlook Handbook which describes the nature of the work and the training of a pharmacist (AF 94-96).

In the Final Determination, the CO appears to acknowledge that the duties related to health/beauty aids may be acceptable (AF 121-122). As stated by the Employer, these may relate to items such as hosiery for varicose veins, pregnancy tests, walkers, wheelchairs, commodes, canes, etc. (AF 103). Accordingly, the major deficiency regarding the combination of duties issue appears to be the Employer's failure to adequately provide the requested documentation for the third party billing requirement.

With regard to the combination of duties issue, and summarizing the rebuttal evidence, the CO concluded:

We accept the fact that pharmacists in community pharmacies perform varied duties, however, we do not accept, third party billing as a required duty or that pharmacists must have experience in each varied duty prior to hire, and employer fails to document these as normal requirements, as directed.

(AF 121). We agree.

The Employer's "documentation" regarding the third party billing issue is extremely limited and fails to comply with the CO's reasonable request for documentation. We accord little weight to the "To Whom It May Concern" letters, which allegedly were signed by various pharmacists. We note that, except for the name and address of the pharmacy, the letters are virtually identical, and we surmise that the letters were actually prepared by the Employer (AF 81-83). Similarly, little weight is accorded to the Employer's mere assertion that third party billing is a required duty of a retail pharmacist (AF 87-93).

The Dictionary of Occupational Titles (D.O.T.) description for a Pharmacist, as set forth in D.O.T. 074.161-010, clearly does not include any reference to third party billing. Furthermore, the Occupational Outlook Handbook regarding the "Nature of Work" of Pharmacists, which were submitted as part of Employer's rebuttal, also fails to include third party billing as one of the

¹Our review of the record indicates that three such letters were submitted by the Employer (AF 100-102). We note that the Final Determination states that four such identical letters were submitted (AF 121). We find this discrepancy to be inconsequential, however.

Pharmacists' functions (AF 94-95). More importantly, as stated above, the CO directed the Employer to document that all its other and present pharmacists had this combination of duties when they were hired; and, if they lacked those skills, to document how the combination of duties were performed in the past; and, establish that no other personnel can perform one or more of the duties; and, document why it would not be feasible to employ two workers, or seek another reasonable solution to perform all of these duties (AF 78). The Employer, in its rebuttal, failed to provide adequate documentation regarding these matters.

It is well established that an employer's failure to produce such documentation clearly warrants the denial of labor certification. *See, e.g., Edward Gerry*, 93-INA-467 (June 13, 1994); *The Foot Works*, 93-INA-464 (Nov. 30, 1994); *The Dwight School*, 93-INA-58 (Apr. 13, 1995). The underlying rationale for this determination is that Employer's failure to provide the requested documentation effectively precluded the CO from weighing such evidence and determining whether the combination of duties truly arises from business necessity or is a mere preference. Accordingly, we find that the CO properly denied labor certification on the above basis.

Assuming *arguendo* that the Employer had established the business necessity for the combination of duties, labor certification would also be denied on the basis of the Employer's rejection of a qualified U.S. applicant for other than lawful job-related reasons, and its failure to show that the job opportunity is clearly open to qualified U.S. workers, in violation of §656.21(b)(6) and §656.20(c)(8). (AF 76-77) .

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

Accordingly, the unlawful rejection of a U.S. applicant does not apply only to formal rejections, but also to rejections which occur because of the actions taken by an employer. In the Notice of Findings, the CO noted that the response of two of the U.S. applicants (Edoga and Kaplan) directly contradicted the statements of the Employer regarding its alleged attempts to contact them (AF 76-77).

In the report of recruitment results, dated July 29, 1993, the Employer alleged that it received Mr. Edoga's resume on June 22, 1993; tried calling her on June 24th and June 25th, but she failed to return the telephone calls. Subsequently, the Employer wrote her a letter on June 30, 1993 and again on July 7, 1993 (by certified mail return receipt requested). Finally, an interview was held on July 15, 1993, at which time the Employer found her to be unqualified (AF 17-18).

Similarly, the Employer alleged that it received Mr. Kaplan's resume on June 21, 1993; tried calling him on several occasions on June 24th and June 25th, and left messages on his answering machine at 201-989-8527; however he failed to return the telephone calls. Subsequently, the Employer wrote him a letter on June 30, 1993 and again on July 7, 1993 (by

certified mail return receipt requested). Finally, on July 12, 1993, Mr. Kaplan informed Employer that "he was not interested in this job and that was reason he had not returned our telephone messages. However, after that he refused to talk any further (AF 18).

In response to the job service "Survey of Referred Applicants," Ms. Edoga and Mr. Kaplan flatly contradicted the Employer's assertions regarding its alleged attempts to contact them. Ms. Edoga stated, in pertinent part:

Their attempt to contact me was through this number (201) 989-8527 (as indicated in their letter of July 7), which has nothing to do with me. My number was clearly noted in my resume. I only got one letter written July 7 through certified mail.

(AF 65).

Similarly, Mr. Kaplan stated, in pertinent part:

I did not receive any contact either by phone or mail until I received the certified letter. The only reason that I did not return the telephone messages was because I never received them. I finally called after receiving the certified letter & finally spoke to Theresa after 3 phone calls (she was not in the first 2 times I called). I did not refuse to talk any further, but after telling her that I already had a job, what more was there to say.

(AF 55).

In its rebuttal, the Employer repeated the same assertions as it had previously made in its report of recruitment results, in part of the Affidavit of Theresa Battista Needham, a Registered Pharmacist for Employer (AF 106).

Upon careful review, we find that the contents of the July 7, 1993 letter, which was sent by certified mail to several of the U.S. applicants, are identical. Specifically, Ms. Needham stated, in separate letters to Jeffrey Kaplan (AF 41), Theophilus B. Olaoku (AF 43), and Felicia U. Edoga (AF 44), the following:

This will serve to confirm that we have tried to contact you for the past two weeks and left messages on your answering machine on 24th and 25th of June, 1993 (on 201-989-8527) concerning your response to our advertisement in the Star Ledger for the position of a Pharmacist. We had written you a letter dated 30th June, 1993, however, you have not responded to same.

Please call us immediately upon receipt of this letter to arrange for an interview for the above noted position.

(AF 41,43,44).

First, we find that Employer's statements stretches credulity, since at least two U.S. applicants (Kaplan and Edoga) independently challenged the veracity of the Employer. See, e.g., *Imperial Asphalt Paving, Inc.*, 93-INA-119 (May 24, 1994)(where employer's contentions that 3 applicants failed to show up for different interviews was contradicted by the applicants' independent statements). Secondly, we note that according to Employer's correspondence, dated July 7, 1993, the Employer not only made repeated unsuccessful attempts to contact these three applicants, but also the Employer called the same telephone number! (*Compare* AF 41,43,44).

Accordingly, even though the Final Determination focused only on the unlawful rejection of Mr. Kaplan, and the CO ultimately accepted the Employer's basis for rejecting Ms. Edoga, we find merit in the CO's questioning the Employer's good faith recruitment and her determination that Mr. Kaplan was unlawfully rejected (AF 120-121). Notwithstanding the Employer's statements to the contrary, in view of Ms. Edoga's similar challenge to the Employer's veracity (AF 65) and the confusion regarding Employer's July 7, 1993 letters (AF 41,43,44), we credit Mr. Kaplan's statement that the Employer first attempted to contact him in the letter, dated July 7, 1993 (AF 54-55). Since this was at least 16 days after the Employer received Mr. Kaplan's resume; the Employer was well aware that Mr. Kaplan had submitted his resume to the Job Service several weeks earlier; there were only a few U.S. applicants for Employer to consider; and, Employer failed to provide a valid excuse or justification; the Employer's delay reflects a lack of good faith.² See, e.g., *Loma Linda Foods, Inc.*, 88-INA-289 (Nov. 26, 1991)(en banc); *Farid Pakravan*, 95-INA-9 (Nov. 26, 1996); *Gabriel Rubanenko, M.D., Inc.*, 92-INA-370 (Dec. 22, 1993); *Com-Spec Properties*, 91-INA-283 (Dec. 2, 1992). Not surprisingly, Mr. Kaplan, a highly qualified U.S. applicant, had already secured another position. Thus, through its actions (or inaction) the Employer, in effect, rejected a qualified U.S. applicant for other than lawful job-related reasons, in violation of §656.21(b)(6).

For the foregoing reasons, we agree with the CO's determination that the application for certification should be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered on this 5th day of December, 1997.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

²Employer acknowledged, in its report of recruitment, that its attorney had requested a copy of Mr. Kaplan's resume on June 8, 1993 and June 15, 1993; but stated that it did not receive the resume until June 21, 1993 (AF 63).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.